United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE

Court of Appeals, District of Columbia.

JANUARY TERM, 1911.

No. 2155.

UNITED CIGAR STORES COMPANY, A CORPORATION,
APPELLANT,

vs.

CHARLES S. YOUNG, APPELLEE.

REPLY BRIEF FOR APPELLANT.

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REPLY BRIEF OF THE APPELLANT.

Counsel for the appellant regret the necessity of availing themselves of the leave of court granted at the hearing to present a brief in reply to the brief of the appellee, which had not been filed when said leave was granted, but the misstatements of fact and evidence in the appellee's brief are so numerous, so flagrant, and so unfair that they cannot with propriety be permitted to pass unnoticed.

On page 2 of the appellee's brief it is stated that after discovering the burglary he "immediately closed the store and notified the manager of the Washington stores," but the testimony shows that the plaintiff first notified the police, and first started the police investigation which he now complains of; and that while he later on notified his superiors in the employment of the defendant, when the first of said employees arrived at the store he found that as a result of Young's report the police were already investigating the burglary and had already reached their own conclusion that the store had been entered by some one having a key thereto (9, 11, 17, 27).

On the same page of the brief it is stated as a fact established in the cause that the combination of the safe was known to Madison, to Dempsey, to two other clerks in the particular store; "to Mr. Bouvier and about forty other clerks," the only authority for this statement being Young's voluntary contribution of a figure of speech in his own behalf while under cross-examination (8). This matter was excepted to at the time, and is presented as error on page 26 *et seq.* of the appellant's brief, while the true facts involved are properly stated in the plaintiff's testimony on page 7 of the record, where he says that at the time of the burglary the employees of the store were four—Madison, Dempsey, another clerk, and Young.

On pages 2 and 3 of the appellee's brief it is said that the detectives did nothing in the matter until Mr. Steinecke "came to Washington in response to a telegram from Mr. Bouvier," but the evidence shows that while the burglary had been reported by telegram to New York on the day after it was discovered, Steinecke first learned of it when he came here on his usual rounds on June 27 (Rec., pp. 15, 24, 27), at which time the detectives had already questioned and investigated the various employees of the store, including Mr. Young, and Young had already admitted to them that "this thing looks God damned bad for me. It places me in a bad position" (17-21).

Similar, but even more flagrant and fictitious misstatements of the facts and the evidence relating to this part of the case, occur throughout pages 6 and 7 of appellee's brief, where it is said that the testimony shows that nothing was done in the matter by the police for two weeks after Young's report thereof, when Steinecke came to Washington for the purpose of investigating the robbery; that thereupon Steinecke, Bouvier, Madison, and Dempsey "determined among themselves to place this charge against the appellee"; that Steinecke then advised the police officers that Young was the guilty party; that up to that time the police had no evidence, suspicion, or gound of suspicion against Young, but that thereupon "acting under the authority and instructions of the said Steinecke, arrested Young and brought him to headquarters."

But Young's testimony shows that he discovered and reported the burglary on June 24, while his alleged arrest occurred, not two weeks afterwards, but four days afterwards, namely, on Friday, June 28 (Rec., p. 9).

And the testimony of all the police officials, from Captain Boardman to Patrolman Mertz, shows an active investigation of the crime from the moment of its first report; that they all perceived its peculiar character from the first; that all the employees of the defendant company having the peculiar knowledge and facilities to commit the peculiar crime were suspected from the first; that Young himself recognized and admitted the grounds of suspicion against himself (17); and finally that no representative of the defendant company ever requested the arrest of anybody in connection with the matter (18, 20, 22).

Thus, counsel for the appellee in his brief, as in his oral argument, states to the court that four particular servants of the defendant company conspired or agreed among themselves to place a criminal charge against a fifth servant, in respect of a transaction in which they were all more or less concerned, and in which five hundred dollars of the defendant's money had disappeared.

And counsel contends that upon some theory of implied authority to one of these conspirators to superintend sales of goods in its stores, the defendant corporation can be held legally liable for a false arrest procured as a result of said conspiracy.

The first proposition of law advanced in the appellee's brief occurs on pages 5 and 6, where it is stated that "we start with the position that if the appellee was entitled to have the case submitted to the jury upon any count in the declaration, there is no reversible error, because the verdict of the jury was a general verdict upon all the counts in said declaration, that is, upon the two counts upon which the case was submitted to the jury."

And counsel for the appellee refers to Mining Company *vs.* Fulton, 205 U. S., 60, and to Standard Oil Company *vs.* Brown, 1 App. D. C., 37, as supporting his proposition; but the complete misstatement of law therein contained is comparable to nothing less erroneous than the misstatements of fact occurring throughout the appellee's brief.

The two counts submitted to the jury charged respectively the torts of false arrest and slander, which are totally dissimilar and unrelated offenses, requiring totally different evidence for their support and presenting totally different issues for decision.

Both of these counts were left to the jury over the objection of the defendant that there was no evidence in the cause legally sufficient to take either of them to the jury (28). The jury thereupon returned a general verdict for the plaintiff in the sum of $2,500 (5), upon which verdict a judgment was thereafter rendered by the court in general form for the plaintiff against the defendant in the sum of $2,500 (5).

This judgment establishes the commission of both of said torts by the defendant corporation, so far as the proceedings below are concerned.

But if this court finds error in said proceedings in respect of either of said wrongs, then it follows that the judgment must be reversed, for it is impossible to say upon which tort the verdict and judgment are based, or how far the verdict was influenced and the defendant injured by the error.

This proposition of law in civil cases is so fully established, both in reason and authority, that we did not burden our main brief with citations in support of it (see Appellant's Brief, p. 6), but since the argument of the appellee's brief is in large measure based upon a denial of this doctrine which it attempts to sustain by the authority of this court, it seems advisable to refer very shortly to the authorities on the subject.

And as long ago as the fifth of Wallace, in a case which went up from this District, it was decided by the Supreme Court of the United States that an appellate tribunal when reviewing the judgment of a trial court, must reverse for error duly excepted to, unless it "appear so clear as to be beyond doubt that the *error did not, and could not,* have prejudiced the party's rights."

Deery *vs.* Cray, 5 Wall., 795.

And this principle has ever since been enforced and maintained by that Court.

Smiths *vs.* Shoemaker, 17 Wall., 639.
Gilmer *vs.* Higley, 110 U. S., 50.
Railroad Company *vs.* O'Brien, 119 U. S., 103.
Mexia *vs.* Oliver, 148 U. S., 673.
Peck *vs.* Heurich, 167 U. S., 629.

And the general principle of appellate jurisdiction and procedure so clearly announced in the above cases, is carried to the very point here in question by the established practice of all the Federal courts upon general verdicts in civil cases.

> "A general verdict cannot be upheld where there are several issues tried, and upon any one of them

> error is committed in the admission or rejection of evidence or in the charge of the court, because it may be that the jury founded their verdict upon the very issue to which the erroneous ruling related, and that they were controlled in their finding by that ruling."
>
> Railroad Company *v.* Needham, 63 Fed. Rep., 114.
>
> Cattle Company *vs.* Martindale, 63 Fed. Rep., 90.
>
> Coal Company *vs.* Johnson, 56 Fed. Rep., 813.
>
> State of Maryland *vs.* Baldwin, 112 U. S., 493.

And the very case of Mining Company *vs.* Fulton, 205 U. S., 60, stated by the appellee to support his position, in fact expressly condemns it, and reverses the judgment there in question because the trial court had taken a view of the matter similar to that of the appellee here, in supposed obedience to a State statute. And the concluding paragraph of the opinion of Mr. Justcie White in that case states the principles involved with his usual clearness:

> "This statute of course lends no support to the contention here made that where a jury is wrongfully permitted over the objection of the opposing party to take into consideration in reaching a verdict counts of a declaration which have not been supported by the evidence, and where it is impossible from the record to say upon which of the counts of the declaration the verdict was based, that the judgment entered in such circumstances can be sustained upon the theory that substantial rights of the objecting party had not been invaded."
>
> Wilmington Mining Company *vs.* Fulton, 205 U. S., at p. 79.

And the appellee's brief is equally inaccurate when it states that its position in this regard is supported by the opinion of this court in Standard Oil Company *vs.* Brown, 31 App. D. C., 371, for that case presented but one issue, namely, whether a certain personal injury to the plaintff was or was not due to the negligence of the defendant. In

that case the one tort in question was described in four alternative ways in four different counts, but the issue was always the same. In this case four different torts are alleged in four different counts, each tendering a different issue. And the opinion of Mr. Justice Van Orsdel in the Standard Oil case very clearly states that but one question was presented to the jury in that case (31 App. D. C., at p. 384).

As to the alleged slander.

In connection with the alleged slander, counsel for the appellee states in his brief—as he said in his argument—that section 107 of Townsend on Slander and Libel, quoted upon the briefs of both parties, if properly considered, is authority for the appellee.

We therefore venture to reprint the whole of said section, which is as follows:

> "The requisites of an oral publication are: That the language must be spoken to or in the presence of at least some one third person.
>
> "No possible form of words can be the basis of an action for slander if at the time of their utterance the only persons present are the speaker and the person whom, or whose affairs, the language concerns.
>
> "The third person present must hear the language spoken.
>
> "Whether the third person present at the speaking did, or did not, hear the language spoken, is in every case a question of fact. And this is not the less the rule because where the speaking is in the presence of a third person under such circumstances that he might have heard what was spoken, he may, as a rule of evidence, be assumed to have heard it, *until it be shown that he did not hear.*
>
> "The burden is on him who alleges a publication to establish that the third person heard the language spoken.
>
> "The third person must understand the language.
>
> "When hereafter we speak of an oral publication,

> or a publication orally, we shall intend a publication with the requisites above mentioned."
>
> Townsend on Slander, sec. 107.

It is submitted that the foregoing statement of a recognized authority on the subject gives full support to the appellant's contention regarding the alleged slander, which is, that before a plaintiff in slander is entitled to go to the jury he must produce evidence of a publication of the slander to at least one-third person who heard and understood the language in question.

But in this case, if all the testimony regarding the publication of the alleged slander be taken in the way most favorable to the plaintiff, it entirely fails to show that any third person heard and understood the language in question. The telephone operator on duty in the telephone room at police headquarters obviously has duties of importance to perform which constantly require, or which at any moment may require, his entire attention, and no presumption can be indulged to the effect that he overhears conversations occurring in the room where he is at work. But he is the only third person shown to have been in the room at the time, and he testifies positively that he did not hear what was said (20). Consequently the only evidence in the case in any way relating to the alleged publication shows that there was no publication.

On page 18 of the Record, Officer Weedon testified that he showed both Young and Steinecke into the telephone room, and that, so far as he knows, the only other person there was Robinson, the telephone operator; on page 9, Young testified that two other men were there, while on page 12 he testified that he was too excited to see whether they were there or not.

Yet on page 11 of his brief, counsel for the appellee contends that the appellant, after producing the only person identified as being present, should account for the absence of his other shadowy third person, and should prove the

negative proposition that this uncertain and unknown person did not hear the language alleged to have been spoken.

But the burden of proving the publication of a slander, as of showing the responsibility of the defendant for the publication when proved, always lies upon the plaintiff, yet in this case a judgment has been rendered which rests wholly upon a *presumed publication,* based upon an *implied authority,* which the jury was permitted to infer would cover the commission of a slander in a police station because of an employment to superintend the sale of goods in stores.

As to the appellee's argument concerning the liability of the defendant company.

Throughout the appellee's brief, Mr. Steinecke is spoken of as the General Manager of the defendant corporation, and the defendant corporation is spoken of as acting through Steinecke as its General Manager (pp. 2, 5, 8, 9 *et passim*). But there is not a word in the evidence to show that Steinecke was ever General Manager of the defendant corporation for a moment. And while the title of any subordinate agent of a corporation proves very little, if anything, concerning his authority, this man's official title of "Superintendent of Sales" appears very clearly in the case, and speaking of him as the General Manager of the defendant corporation is wholly inaccurate and somewhat misleading.

On page 14 of his brief, counsel for the appellee appears to contend that it is the duty of the defendant to show lack of authority in its agents, whereas the burden is of course on the plaintiff to show that the agents of the defendant involved in this matter had authority to commit the defendant corporation to wrongful acts, and on the same page of the brief it is stated that "no by-laws were offered to show what the duties of the General Manager were; no information was furnished upon the subject, except the bare denial of the said Steinecke that he had no authority to make the

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arrest," and that Steinecke "was the only person representing the company or had anything to do with the company" who appeared at the trial and testified.

But the truth is that counsel for the appellee called for the by-laws; that they were produced and tendered to him; that they were not offered in evidence by him; and that another representative of the defendant company familiar with the subject did appear and did testify that the duties of Mr. Steinecke as superintendent of sales are not defined in writing (Rec., pp. 23, 24, 26).

The only other evidence in the case as to Steinecke's authority is the testimony of Steinecke himself, and consequently no contradiction of evidence exists concerning his authority. This testimony shows that he is the superintendent of the sales department of the defendant company in a district including the city of Washington; that his duties as superintendent of sales were to see that the stores are properly stocked and kept clean; that the clerks conduct themselves properly; that the stores are run according to the policy of the United Cigar Stores Company; that he has no authority as a part of said duties to order the arrest of anybody; and that he did not request or authorize the arrest of Mr. Young or anybody else (24).

That he first learned of the burglary when he arrived in Washington on his rounds several days thereafter (27); that his duties call him to Washington about once a month; and that he has authority to employ and discharge clerks (13).

There is here nothing to show that Steinecke had any authority whatever to do anything towards the punishment of offenders against the company or its property; or to wield any executive authority for the company; or that any executive officer of the company previously authorized or subsequently ratified his acts.

The result of the evidence in this regard is clearly to bring this case within the controlling authority of Lansden

vs. Gas Company, 172 U. S., 534, where the corporate agent whose authority was held insufficient to bind his employer was really the "General Manager of the defendant corporation."

Regarding the reasonable ground of suspicion after felony committed.

This subject is discussed on pages 16 *et seq.* of the appellee's brief, where the principle appears to be conceded that what constitutes reasonable ground of suspicion after felony committed is a question of law to be decided by the court, when the facts are established in the cause.

But the appellee contends that the facts were not established, but were in dispute, yet he entirely fails to point out wherein the facts were not established, or wherein they were in dispute.

Now, the uncontradicted evidence shows that the felony was committed; that it was of a peculiar character, indicating that it had been committed by some person having peculiar knowledge of the premises and of the course of business therein conducted; that said person possessed a key to the store and the combination of the safe; that said felony had been reported to the police; and that the police immediately began an investigation of the matter. The uncontradicted evidence further showed that Young possessed the requisite knowledge, the key, and the combination, in common with the three other employees of the store; that in addition he had an apparent physical opportunity to commit the crime during the five hours when he was in charge of the store alone on the night of the burglary; that immediately upon its discovery he appeared to know the entire amount taken from the safe, although it was made up of various sums not within his information; and on the day before his alleged arrest he had admitted to the police that "this thing looks

God damned bad for me. It places me in a bad position" (17).

Many of these facts appeared from the testimony of the plaintiff himself, and the remainder appeared from the testimony of witnesses given in his presence, which he had an opportunity to contradict or deny, but he made no attempt to do so. Consequently these facts were established by uncontradicted evidence in the cause, and they accordingly presented a question of law for the decision of the court, namely, whether or not reasonable ground of suspicion of felony existed against the plaintiff.

This position was urged upon the trial court in the argument on the motion for a directed verdict, but he expressly denied the proposition that reasonable ground of suspicion after felony committed is question of law for the court, and over the objection of the defendant (37) he left it to the jury to say whether or not such reasonable ground existed in this case. The jury promptly found that it did not exist, and returned its verdict for $2,500 in favor of the plaintiff.

Now, it is obvious from the authorities quoted in our main brief, that in submitting this question to the jury under the facts established by the uncontradicted evidence, the court erred; and since the tribunal to which he erroneously submitted the issue decided it against the party who objected to such submission, the result is error requiring the reversal of the judgment, because an appellate tribunal reviewing the judgment of a trial court must reverse for error duly excepted to, unless it "appear so clear as to be beyond doubt that the error did not, and could not, have prejudiced the party's rights."

Deery *vs.* Cray, 5 Wall., 795, and other cases cited *supra.*

Regarding the defendant's fifth prayer, which is discussed on pages 19 and 20 of the appellee's brief, it is again

submitted that said prayer was erroneously denied for the reasons set out on pages 31 and 34 of the appellant's brief.

And the portions of the charge of the court quoted by the appellee on pages 19 and 20 of his brief do not clearly instruct the jury that if they found from the evidence that Young accompanied the officers to police headquarters voluntarily, they must find the matter of the alleged false arrest for the defendant. The portion of the charge quoted by the appellee undertakes to define false imprisonment in terms of mental domination, which was specially excepted to by the defendant at the time (37), but the charge given is by no means equivalent to the prayer asked, and therefore if the prayer was proper on the evidence, the denial thereof was error.

Summing up the contentions of the appellant presented in this reply brief, without waiving the further matters relied on in the main brief, it is submitted that the court below erred ~~in denying the motion for a directed verdict because~~

I. In denying the motion for a directed verdict, because—

A. The alleged arrest was lawful.

B. There was no evidence for the jury of the publication of the alleged slander.

C. There was no legally sufficient evidence that any agent of the defendant corporation engaged in this matter had authority to commit the corporation to a tort.

D. If the trial court erred in submitting either count of the declaration to the jury, in view of the general form of the verdict the judgment must be reversed.

II. The court erred in requiring the jury to decide whether or not reasonable ground of suspicion existed against the plaintiff, after felony committed and facts established.

III. The court erred in denying the defendant's fifth prayer.

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